

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF DELAWARE**

HARRY SMITH, JR. and  
ROSLYN WOODARD SMITH,  
Individually and as Administrators of  
The ESTATE OF HARRY SMITH, III,

Plaintiffs,

v.

CIVIL ACTION NO. 04-1254-GMS

CITY OF WILMINGTON,

JOHN CIRITELLA, in his individual capacity  
and in his official capacity as a police officer of  
the Wilmington Police Department,

THOMAS DEMPSEY, in his individual capacity  
and in his official capacity as a police officer of  
the Wilmington Police Department, and

MATTHEW KURTEN, in his individual capacity  
and in his official capacity as a police officer of  
the Wilmington Police Department,

Defendants.

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**PLAINTIFFS' RE-NEWED MOTION TO FILE A RESPONSE  
TO DEFENDANTS' REPLY BRIEF IN SUPPORT OF  
DEFENDANTS' MOTION FOR SUMMARY JUDGMENT  
And  
CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 7.1.1**

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On or about July 18, 2006, Plaintiffs, by their counsel, moved this Honorable Court for an order allowing them to file a response to defendants' reply brief. Plaintiffs complied with Local Rule 7.1.1, noting defense attorney John Parkins stated he had no position on the motion. Plaintiffs did not receive a response from the Court.

Plaintiffs respectfully re-new their request because they need to alert the Court to an error of fact stated in their brief and the existence of WPD policy directive 6.3 (F). WPD policy directive 6.3 (F) states: "The shotgun will be placed in the trunk of the

vehicle in the 'carload' state. The 'carload' consists of (4) rounds of double O buck in the magazine, chamber empty and the safety in the 'on' position."

This point is crucial to the Court's consideration of the issues presented by the defendants in their motion for summary judgment. As a basis for their argument that their actions were reasonable, defendants repeatedly stated they believed the shotgun was in the passenger compartment of the car and, therefore, Harry Smith, III posed a threat or danger because he had access to this shotgun.

As correctly noted in plaintiffs' brief in opposition to defendants' motion for summary judgment, WPD officer Johnny Whitehead testified he put the shotgun in the trunk of the car. [Whitehead Deposition, page 138 of the Appendix attached to plaintiffs' brief in opposition to defendants' motion for summary judgment.] However, plaintiffs incorrectly stated (at page 6, paragraph 5 of their brief) Whitehead violated WPD policies by storing the shotgun in the car trunk. According to Wilmington Police Department (WPD) policy directive 6.3(F), this is exactly where the shotgun should have been placed, i.e., in the trunk of the police car.

Contrary to defendants' argument and testimony, these officers knew this shotgun was placed in the trunk of the car. Consequently, they knew Harry did not have access to this shotgun from the time he took the car until the time they shot him dead.

Twenty six police officers were involved in pursuing Harry Smith, III. [Please see Exhibit 1 attached hereto.] As previously mentioned in plaintiffs' brief (page 18, paragraph 79), the pursuit lasted just a few minutes. There was no way for Harry to get the shotgun out of the trunk of the police car and pose a threat or danger with this gun. And these defendants knew this at the time they fired their weapons.

Defendants marked all WPD policy directives confidential, so policy 6.3 is being sent to the Court via overnight mail, marked "sealed".

### **CERTIFICATION OF COMPLIANCE WITH LOCAL RULE**

I hereby certify I complied with the local rule to confer with opposing counsel before I initially filed this motion in July 2006 to respond to defendants' reply brief. Attorney John Parkins then stated he takes no position on plaintiffs filing a response to defendants' reply brief.

Respectfully submitted this 5<sup>th</sup> day of September 2006.

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### **CERTIFICATE OF SERVICE**

I hereby certify that on September 5, 2006, I electronically filed the foregoing Plaintiffs' Motion with the Clerk of Court using CM/ECF which will send notification of such filing(s) to the following e-mail address:

Attorney John Parkins E-mail [Parkins@rlf.com](mailto:Parkins@rlf.com)

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